75-1490

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

MAX ZIVIAK, individually
and as Administrator of the
Estate of Herbert Ziviak, on
behalf of himself and all
others similarly situated,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellees.

On Appeal from a Three Judge Court of the
United States District Court for the
District of Massachusetts

JURISDICTIONAL STATEMENT

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732-3173

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April 14, 1976

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JURISDICTIONAL STATEMENT

Pursuant to Supreme Court Rules 13(2) and 15, Max Ziviak Individually and as Administrator of the Estate of Herbert Ziviak and all others similarly situated, the above Appellants file this, their statement of the basis on which the Appellant contends that the Supreme Court of the United States has appellate jurisdiction to review on appeal the judgment appealed from herein.

I. OPINION BELOW

There are no official or unofficial reports of the opinion delivered in the court below. A copy of the opinion of the court below is appended.

II. GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED

1. This is a class action seeking to have declared unconstitutional subsection (b) of Section 3203, Title 38 of the U.S. Code, entitled "Hospitalized veterans and estate of incompetent institutionalized veterans" on the grounds that it discriminates against parents of incompetent veterans; seeking to enjoin the Veterans Administration from enforcing and/or causing an unconstitutional effect by its interpretation of the said statute; seeking an order to the V.A. to pay certain sums of money, brought pursuant to sections 1331, 1346(9)(2), 2201, 2202, 2282 and 2284 of Title 28, United States Code, and heard by a Three Judge Court.

2. The Judgment appealed from granting defendant summary judgment is dated and was entered on March 15, 1976, and is

based upon an Opinion dated March 5, 1976. Plaintiff/appellant's Motion for Rehearing was denied March 15, 1976. Notice of Appeal was filed March 26, 1976 in the U.S. District Court for the District of Massachusetts.

3. Jurisdiction of appeal is conferred on this Court by Section 1253 of Title 28, United States Code.

4. Cases sustaining the jurisdiction are: Schneider v. Smith, 390 U.S. 17 (1968); Gonzalez v. Automatic Emp. Credit Union, 419 U.S. 90 (1974); Mayhue's Super Liquor Store, Inc., v. Meiklejohn, 426 F 2d 142 (5 Cir. (1970); Melendez v. Shultz, 486 F 2d 1032 (1 Cir. Mass., 1973).

5. The statute of the United States the validity of which is involved is Section 3203(b) of Chapter 55 of Title 38, United States Code, Volume 8, page 9201 which provides:

(b)(1) Where any veteran having neither wife, child, nor dependent parent is being furnished hospital treatment, institutional or domiciliary care by the Veterans' Administration, and is rated by the Veterans' Administration in accordance with regulations as being incompetent by reason of mental illness, the compensation or retirement pay of such veteran shall be subject to the provisions of subsection (a) of this section; however, no payment of a lump sum herein authorized shall be made to the veteran until after the expiration of six months following a finding of competency and in the event of the veteran's

death before payment of such lump sum no part thereof shall be payable.

(2) In any case in which such an incompetent veteran having neither wife nor child is being furnished hospital treatment, institutional or domiciliary care without charge or otherwise by the United States, or any political subdivision thereof, and his estate from any source equals or exceeds $1,500, further payments of pension, compensation, or emergency officers' retirement pay shall not be made until the estate is reduced to $500.

The amount which would be payable but for this paragraph shall be paid to the veteran as provided for the lump sum in paragraph (1) of this subsection, but in the event of the veteran's death before payment of such lump sum no part thereof shall be payable.

III. THE QUESTIONS PRESENTED ON APPEAL ARE:

1. Is Section 3203(b) of Title 38, U.S. Code in violation of the Due Process clause of the United States Constitution?

2. Does Section 3203(b) of Title 38, U.S. Code unconstitutionally deprive parents of deceased incompetent veterans of benefits paid to parents of deceased competent veterans and thereby discriminates against parents of incompetent veterans?

3. Is the Veterans' Administration unconstitutionally interpreting and applying Section 3203(b) of Title 38, U.S. Code to deprive parents of incompetent veterans of the benefits which are paid

to parents of competent veterans?

4. Has Congress established an irrebuttable presumption in Section 3203(b) of Title 38, U.S. Code to the effect that incompetent veterans are hospitalized longer than competent veterans?

5. Was Summary Judgment for the United States appropriate?

6. Was the purpose of Congress in enacting Section 3203(b) of Title 38, U.S. Code to prevent excessive accumulations of benefits for incompetent veterans from passing to distant relatives?

7. May Congress enact a Statute to prevent excessive accumulations of veteran's benefits by presuming that the length of time incompetent veterans are hospitalized is longer than the period of hospitalization of competent veterans without referring to periods of hospitalization in the statute?

8. Is a statute which is held to discriminate between veterans based on the length of time they are hospitalized constitutional, where the length of hospitalization is not referred to in the statute?

9. Where the purpose of a statute is to prevent benefits from being paid to Veterans who are hospitalized for a period in excess of "x" months, is such a statute arbitrary or capricious where it does not refer to the period of months in the statute but simply assumes that incompetent veterans are hospitalized for such a

period of time and competent veterans are not?

10. Is the statute which provides for payments to parents of veterans, in violation of the Constitution where it discriminates against parents of incompetent veterans?

IV. STATEMENT OF THE CASE.

Herbert Ziviak, a veteran, had died on January 9, 1972, while a patient in a Veterans' Administration hospital. The deceased had been rated incompetent by the Veterans' Administration since November, 1946, due to a service connected psychiatric disorder and had been hospitalized by the Veterans' Administration from 1946 until his death. Ziviak had never married and had no children. His father, Max Ziviak, the plaintiff in this case, is the sole surviving parent and had been classified as a needy dependent parent for the purpose of apportionment of benefits not paid his son while hospitalized. At the time of his death, Herbert Ziviak's estate exceeded $1,500.

Subsequent to his son's death, plaintiff applied for payment of the lump sum disability benefits that would have been payable to his son on account of his disability had he died while competent. This application was denied throughout the administrative process, culminating in a decision by the Board of Veterans Appeals dated January 30, 1974. That decision again denied benefits sought by plaintiff, finding that 38 U.S.C. Section 3203 barred such payment. Plaintiff thereupon filed this suit on March 25, 1974. On April 18, 1974, a three-judge

court was designated by order of the Chief Judge of the United States Court of Appeals for the First Circuit.

The Plaintiffs moved for Summary Judgment. The Defendant, at the hearing therein, presented data in support of an argument that incompetent veterans suffer longer periods of institutionalization than do competent veterans. The Defendant also moved to dismiss the action. The Motion to Dismiss was denied; the Motion for Summary Judgment was allowed in favor of the Defendant, thus upholding the constitutionality of the statute and denying the injunction and other prayers of the Plaintiffs.

V. REASONS WHY QUESTIONS PRESENTED ARE SUBSTANTIAL.

These questions pertain to an action certified by the Three Judge Court as a class action involving numerous veterans who died in veterans' hospitals. The individual claimant alone has a cause of action for $55,000.00. The statute involved deprives all of these persons of benefits available to similarly situated parents of competent deceased veterans solely because their children died incompetent. As interpreted by the court below the statute establishes an "irrebuttable presumption," which scheme is repugnant to the due process clause (e.g. Stanly v. Illinois, 405 U.S. 645,653 (1972), Bell v. Burson, 402 U.S. 535 (1971); Vladis vs. Cline, 412 U.S. 441, 446 (1973); Cleveland Board of Education v. La Fleur, 414 U.S. 632,644 (1974).) This is a case of first impression involving this provision of this statute. The statute is

unreasonable, arbitrary and capricious and deprives parents of deceased incompetent veterans of benefits without due process of law. See also Gomez v. Perez, 409 U.S. 536,538 (1973), Berkey v. U.S., (Ct. of Claims, 1966) 361 F 2nd 983,986. Davis v. Richardson, 409 U.S. 1069 (1972), Griffin v. Richardson, 409 U.S. 1969 (1972).

VI. MISCELLANEOUS.

1. This appeal is not from a decree of a court involving an interlocutory injunction.

2. There is appended hereto a copy of the opinion of the court below. There are no separate findings of fact or conclusions of law.

3. There is appended hereto a copy of the judgment herein and the order denying rehearing.

4. There is appended hereto a copy of the notice of appeal showing the date it was filed and the name of the court where it was filed.

5. Pursuant to Supreme Court Rule 33(2)b take notice that Section 2403, Title 28, U.S. Code may be applicable.

VII. CONCLUSION.

It is respectfully submitted that the Supreme Court of the United States has jurisdiction of the appeal.

14 day of April, 1976

Louis Kerlinsky Counsel

Louis Kerlinsky, Esq.
for Appellants
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Springfield, Mass. 01103

Certificate of Service

I, Louis Kerlinsky, Attorney for the Appellants, certify that on April 14, 1976, I served a copy of this Jurisdictional Statement upon the Solicitor General, Department of Justice, Washington, D.C. 20530; The Veterans Administration and the U.S. Attorney's Office, Boston, Massachusetts, by mailing same, postage prepaid, air mail.

Louis Kerlinsky
Louis Kerlinsky, Esq.

April 14,1976

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MAX ZIVIAK, Administrator

v. CIVIL ACTION
NO. 74-1062-F
UNITED STATES OF AMERICA

Before McEntee, Circuit Judge,
Skinner and Freedman, District Judges.

OPINION
March 5, 1976

FREEDMAN, D.J.

This is an action in which the plaintiff seeks to have the Court declare unconstitutional subsection (b) of 38 U.S.C. Section 3203, entitled "Hospitalized veterans and estates of incompetent institutionalized veterans," on the ground that it discriminates against parents of incompetent veterans. It is alleged that the section "prohibits parents of incompetent veterans from obtaining the benefits which would have been paid to them had their child died competent," thereby violating the Due Process Clause of the Fifth Amendment. It is further alleged that the interpretation of the section in question by the Veterans' Administration is erroneous in that it causes an unconstitutional effect. Plaintiff purports to represent a class consisting of all others similarly situated. He further asks the Court to grant plaintiff and the members of the

purported class payment of all monies that would be due them had their children died competent, and costs pursuant to Rule 54(d) of the Federal Rules of Civil Procedure. The convening of a three-judge district court, pursuant to 28 U.S.C. Sections 2282 and 2284, has also been requested by plaintiff. The matter is currently before the Court on defendant's motion to dismiss and plaintiff's motion for summary judgment.

Class Action

In addition to himself, plaintiff seeks to represent a class consisting of those parents of deceased incompetent veterans who would be entitled to veterans' benefits but for the language in 38 U.S.C. Section 3203 dealing with survivors of such veterans. It is alleged that all the prerequisites necessary to maintain a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure are present. Pursuant to subsection (c)(1) of Rule 23, the Court determines and orders that this action is properly maintainable as a class action. The Court orders that plaintiff Ziviak may sue as a representative party on behalf of all surviving parents of deceased incompetent veterans who would be entitled to accumulated veterans' benefits but for the language in 38 U.S.C. Section 3203 barring payment.

The Court finds that the class is so numerous that joinder of all members is impracticable, that there are questions of law or fact common to the class, that the claims of the representative party here are typical of the claims of the

class he represents, and that the representative party will fairly and adequately protect the interests of the class. In addition, the Court finds that the opposing party has refused to act on grounds generally applicable to the class. That is, it has utilized the challenged statute in such a manner as to deny plaintiff payment of veterans benefits to which he is allegedly entitled. The Court finds the class action to be maintainable under Rule 23(b)(2).

Facts

The material facts do not appear to be at issue. Herbert Ziviak, a veteran, had died on January 9, 1972, while a patient in a Veterans' Administration hospital. The deceased had been rated incompetent by the Veterans' Administration since November, 1946, due to a service connected psychiatric disorder and had been hospitalized by the Veterans' Administration from 1946 until his death. Ziviak had never married and had no children. His father, Max Ziviak, the plaintiff in this case, is the sole surviving parent and had been classified as a needy dependent parent for the purpose of apportionment of benefits not paid his son while hospitalized. At the time of his death, Herbert Ziviak's estate exceeded $1,500.

Subsequent to his son's death, plaintiff applied for payment of the lump sum disability benefits that would have been payable to his son on account of his disability had he died while competent. This application was denied throughout the administrative process, culminating in a

decision by the Board of Veterans Appeals dated January 30, 1974. That decision again denied benefits sought by plaintiff, finding that 38 U.S.C. Section 3203 barred such payment. Plaintiff thereupon filed this suit on March 25, 1974. On April 18, 1974, a three-judge court was designated by order of the Chief Judge of the United States Court of Appeals for the First Circuit.

Motion to Dismiss

Defendant's motion to dismiss is based on three grounds: that the Court lacks jurisdiction of the subject matter of the complaint; that the administrative ruling by the Veterans' Administration is not subject to judicial review; and that the complaint fails to state a claim upon which relief may be granted.

The Court denies summarily defendant's motion to dismiss for failure to state a claim upon which relief can be granted. The complaint presents a substantial federal question and is not considered frivolous.

The Court also denies dismissal on the ground that the administrative ruling is not subject to judicial review. In this assertion, defendant relies primarily on 38 U.S.C. Section 211(a), which provides in pertinent part that

> the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States

shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

If defendant's argument were to be accepted, section 211(a) would in effect preclude the federal courts from passing on the constitutionality of veterans' benefits legislation. This position has been rejected, however, by the United States Supreme Court in Johnson v. Robison, 415 U.S. 361 (1974). Discussing the prohibition in section 211(a), the Court stated that those prohibitions

would appear to be aimed at review only of those decisions of law or fact that arise in the administration by the Veterans' Administration of a statute providing benefits for veterans. A decision of law or fact "under" a statute is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts.

415 U.S. at 367 (emphasis by the Court). Noting that the plaintiff's constitutional challenge was not to a "decision of the Administrator, but rather to a decision of Congress to create a statutory class," Id., the Court agreed with the District Court that "'The questions of law presented in these proceedings arise under the Constitution, not under the statute whose validity is challenged.'" Id. (quoting from Johnson v. Robison, 352 F. Supp. 848, 853 (D. Mass. 1973)). The Court concluded that the prohibitions of section 211(a) do "not extend . . . to actions challenging the constitutionality of laws providing benefits for veterans." 415 U.S. at 373.

As in Robison, the gravamen of the complaint in the instant case is the constitutionality of 38 U.S.C. Section 3203. Section 211 (a) cannot therefore act to bar access to judicial review by this Court.

The parties have filed a number of motions and supporting memoranda which relate to the question of subject matter jurisdiction in this case. Plaintiff's original complaint asserted jurisdiction pursuant to 28 U.S.C. Sections 2282 and 2284. Thereafter, plaintiff filed two motions to amend its complaint, asserting that the suit was also brought pursuant to 28 U.S.C. Sections 2201 and 2202, and 28 U.S.C. Sections 1331 and 1336, respectively. Both motions were allowed. Defendant's memoranda in support of its motion to dismiss challenge the ability of any of these statutes to confer jurisdiction. Subsequent to their filing, plaintiff moved to further amend his complaint in such a manner as to indicate that the suit was also being brought pursuant to 28 U.S.C. Section 1346(a)(2), and that a previous motion to amend the complaint had inadvertently referred to 28 U.S.C. Section 1336 instead of section 1346. Defendant thereupon filed opposition and a supporting memorandum to this recent amendment by plaintiff.

In order that the question of subject matter jurisdiction may be settled, the Court allows both parties to file all motions, oppositions to motions, and memoranda relating to subject matter jurisdiction that were offered subsequent to oral argument.

There appears to be a question as to what monetary amount plaintiff would be

entitled to should he prevail in his suit. Plaintiff alleges that the amount in controversy is approximately $55,000.00, and therefore jurisdiction exists under 28 U.S.C. section 1331, which requires that the amount exceed the sum or value of $10,000.00. Defendant, on the other hand, asserts that, if successful in his case, plaintiff would be entitled only to $3,579.50. To arrive at this figure, defendant claims that 38 U.S.C. section 3021 is applicable in determining how much money plaintiff might be entitled to, and that by reason of that statute, plaintiff's recovery would be limited to the amount accumulated "for a period not to exceed one year" prior to the veteran's death. Defendant then indicates, by way of an affidavit from the Adjudication Officer of the Veterans' Administration Regional Office in Boston, Massachusetts, that in the year prior to the death of plaintiff's son, the Veterans' Administration withheld from the son $3,579.50.

If section 3021 does apply to the situation in this case, plaintiff would apparently be precluded from bringing his suit pursuant to 28 U.S.C. section 1331. As plaintiff correctly points out in response to this argument, however, defendant did not fully quote the relevant portions of section 3021. That section provided in pertinent part, at the time of death of plaintiff's son:

> (a) Except as provided in section 3203(a)(2)(A) of this title and sections 123-128 of title 31, periodic monetary benefits (other than insurance and servicemen's indemnity) under laws administered by the Veterans' Administration to

> which an individual was entitled at his death under existing ratings or decisions, or those based on evidence in the file at date of death . . . and due and unpaid for a period not to exceed one year, shall, upon death of such individual be paid as follows:
>
> . . . .
>
> (2) Upon the death of a veteran, to the living person first listed below:
>
> (A) His spouse;
> (B) His children (in equal shares);
> (C) His dependent parents (in equal shares);
>
> . . . .
>
> (Emphasis added).

In promulgating the above statute, Congress clearly indicated that section 3021 was not to apply to such benefits under section 3203(a)(2)(A).[1] That subsection, as will later be seen, sets forth the procedure by which unpaid benefits should be distributed "[i]n the event of the death of any veteran subject to the provisions of this section." A reading of subsection (b) of section 3203 indicates that payment of benefits to veterans covered by subsection (b) "shall be subject to the provisions of subsection (a) of this section." This Court is therefore of the opinion that it was the intent of Congress that section 3021 of Title 38 should not affect the distribution of benefits to any person entitled to them under either subsection (a) or (b) of section 3203. Since plaintiff has

alleged that the amount of benefits accumulated for his son, but withheld due to his death, exceeds $10,000.00, plaintiff has asserted a proper basis for jurisdiction in his citing of 28 U.S.C. section 1331. It will therefore be unnecessary to examine the sufficiency of the other statutes under which jurisdiction has been alleged. The Court denies defendant's motion to dismiss on the ground that the Court lacks jurisdiction of the subject matter.

Summary Judgment

Plaintiff has moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. A review of the pleadings reveals that there is indeed no genuine issue as to any material facts, and therefore the matter is properly before the Court on plaintiff's motion.

The statute in question, 38 U.S.C. section 3203, sets out the procedure by which benefits are to be apportioned to veterans who are being cared for in institutions maintained by the Veterans' Administration. Since the death of plaintiff's son in January, 1972, that section has been revised by Pub. L. No. 92-328, section 104, which became effective August 1, 1972. While the section has remained essentially the same in its effect upon institutionalized veterans, it is of course the form in which the section existed at the time of plaintiff's son's death that is controlling in this case and which will be discussed below.

At the time plaintiff's son died in

1972, section 3203(a) provided that where such a veteran had neither a wife, child, nor dependent parent, compensation or retirement pay would continue unreduced for six months following admission, but that after that period only one half of the money, if in excess of $30.00 per month, would be paid to the veteran. Upon discharge he was to be paid a lump sum equivalent to the amount by which his benefits had been reduced, except that that lump sum would be withheld for six months if he had left against medical advice or because of disciplinary action. If the veteran died while he was institutionalized or before payment of the lump sum has been made, the money would be paid to either the surviving spouse, children, or dependent parents, in accordance with the priority set out in 3203(a)(2)(A).[2] If there were no such survivors, the only payments that would be made would be for expenses of burial or last sickness.

Having established the above criteria regarding apportionment of benefits, section 3203 then set out in subsection (b) somewhat different standards under which benefits would be apportioned in the case of institutionalized veterans who had been rated mentally incompetent.

That subsection provided:

(b)(1) Where any veteran having neither wife, child, nor dependent parent is being furnished hospital treatment, institutional or domiciliary care by the Veterans' Administration, and is rated by the Veterans' Administration in accordance with regulations as being incompetent by reason of mental illness,

the compensation or retirement pay of such veteran shall be subject to the provisions of subsection (a) of this section; however, no payment of a lump sum herein authorized shall be made to the veteran until after the expiration of six months following a finding of competency and in the event of the veteran's death before payment of such lump sum no part thereof shall be payable.

(2) In any case in which such an incompetent veteran having neither wife nor child is being furnished hospital treatment, institutional or domiciliary care without charge or otherwise by the United States, or any political subdivision thereof, and his estate from any source equals or exceeds $1,500, further payments of pension, compensation, or emergency officers' retirement pay shall not be made until the estate is reduced to $500. The amount which would be payable but for this paragraph shall be paid to the veteran as provided for the lump sum in paragraph (1) of this subsection, but in the event of the veteran's death before payment of such lump sum no part thereof shall be payable.

It is apparent from a reading of the various subsections of section 3203 already discussed that Congress chose to differentiate between survivors of mentally competent and mentally incompetent veterans, barring payment of the lump sum that had been accumulated to the survivors of an incompetent veteran who had died while still rated incompetent. It is this differentiation that plaintiff challenges as unconstitutional.

It appears to be well settled that

veterans have no vested right to receive Veterans' Administration benefits. Generally, the Supreme Court has stated:

Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress.

Lynch v. United States, 292 U.S. 571,577 (1934). Dealing specifically with veterans' benefits, the First Circuit has stated that such benefits are

gratuities and establish no vested rights in the recipients so that they may be withdrawn by Congress at any time and under such conditions as Congress may impose.

Milliken v. Gleason, 332 F.2d 122, 123 (1st Cir. 1964), cert. denied, 379 U.S. 1002 (1965). See DeRodulfa v. United States, 461 F.2d 1240, 1257 (D.C. Cir.), cert. denied, 409 U.S. 949 (1972); Van Horne v. Hines, 122 F.2d 207, 209 (D.C. Cir.), cert. denied, 314 U.S. 689(1941); Taylor v. United States, 379 F. Supp. 642, 649 (W.D. Ark. 1974).

The fact that there exists no vested right to these benefits does not mean that the differentiation Congress has imposed escapes scrutiny under the Fifth Amendment. This principle was discussed in United States v. Macioci, 345 F. Supp. 325 (D. R.I. 1972). In Macioci, the United States sought to recover overpayments of $19,280 in Veterans' Administra-

tion benefits from the guardian of an incompetent veteran. At the time of the veteran's admission to a veterans home, his estate exceeded $1,500. As a basis for its claim to recovery, the Government looked to section 3203(b)(2), which, as already seen, bars payment of benefits until the veteran's estate is reduced to $500. As one of its arguments defendant challenged the constitutionality of the section, arguing that the classifications established by that section were arbitrary and capricious and that withholding of benefits in the case would be a deprivation of property without due process of law. The court rejected these arguments. Following the established principle that veterans' benefits are gratuitous and recipients have no vested right to them, it went on to state:

> The fact that payments made pursuant to an Act of Congress are characterized as "gratuitous" does not totally immunize the Act from scrutiny under the Fifth Amendment. The interest of the recipient of such payments is "of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause."

345 F. Supp. at 327 (quoting from Flemming v. Nestor, 363 U.S. 603, 611 (1960)). As the court in Macioci correctly stated, however, the scope of protection is limited. In this regard it quoted portions of two cases which are most pertinent:

> "Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program . . . , we

> must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification."

Flemming v. Nestor, supra, 363 U.S. at 611, 80 S. Ct. at 1373.

> "If the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment."

Richardson v. Belcher, 404 U.S. 78, 92 S. Ct. 254, 30 L. Ed. 2d 231 (1971).

345 F. Supp. at 328-29.

While Macioci does not deal with the same issues as are present in the instant case, it does shed light on the constitutionality of section 3203 in general. Its relatively brief discussion of the purposes of Title 38 and their relation to the classifications created in section 3203 reveal several conclusions. The court felt that an obvious purpose of Title 38 is that benefits authorized therein are to be provided to needy veterans and their immediate dependents; and that "[a] corollary of this purpose is that compensation should not be paid where there is little likelihood that it will ultimately benefit an eligible veteran or his dependents." The court went on to reason:

> Section 3203(b)(2) envisions such a situation; it recognizes that an incompetent

veteran whose basic needs are taken care of by the government through hospitalization may have little use for periodic benefits directed toward these same needs during the period of hospitalization. Benefits received on such a veteran's behalf could accumulate in his estate during his hospitalization, and if he dies while still hospitalized, the accumulated amounts would pass to his heirs without having benefited the veteran directly.

345 F. Supp. at 328.

After a review of the general purposes of Title 38, as they related to withholding of benefits under section 3203(b)(2), the court in Macioci concluded:

Clearly the classifications are "rationally related" to the purpose of Title 38 that veterans' benefits be paid only, as the term suggests, for the benefit of veterans. I find that the reclamation of veterans' benefits paid contra to 38 U.S.C. section 3203(b)(2) is not precluded by the Due Process Clause of the Fifth Amendment.

345 Supp. at 329 (footnote omitted).

What relevant legislative history exists relating to the general intent of Congress in its wording of section 3203 (b) is found in reference to Pub. L. No. 86-146, 73 Stat. 297, which in 1959 amended subsection (b) so as to be worded as it was at the time of Herbert Ziviak's death. That act added to subsection (b) the portion "and in the

event of the veteran's death before payment of such lump sum no part thereof shall be payable." Senate Report No. 344, June 5, 1959, discussing the bill which became Pub. L. No. 86-146, states that the purpose of the bill was

to prevent gratuitous benefits for incompetent veterans receiving care at public expense from accumulating in excessive amounts and passing upon the death of the veteran to relatives having no claim against the Government on account of the veteran's military service.

An examination of Pub. L. No. 86-146 reveals that it not only amended section 3203, but also revised section 3203, a statute that deals with payments of benefits to guardians of incompetent veterans. In that regard, section 3203(d) was amended so as to provide for payment, upon death of the incompetent veteran, of gratuitous benefits withheld from such guardian for reasons set forth in the section, not to the guardian or representative but to the surviving spouse, children, or parents. With this in mind, the stated purpose of the bill is more clearly understood. Congress was aware of the necessity of caring for incompetent veterans and their dependents, yet concerned with the possibility that benefits might pass to persons other than the veteran or immediate dependent, thereby defeating the major purpose of Title 38. In this regard, it created specific procedures by which such benefits would be distributed. Congress was not unmindful, in its enactment of section 3203, of the occasional need to provide for dependent parents of incompetent veterans, the

class with which this case is concerned. At the time of Herbert Ziviak's death, 38 U.S.C. section 3203(b)(3) stated in pertinent part:

> Where any benefit is discontinued by reason of paragraph (2) of this subsection the Administrator may nevertheless apportion and pay to the dependent parents of the veteran on the basis of need all or any part of the benefit which would otherwise be payable to or for such incompetent veteran.[3]

It is thus apparent that, while the statute regulates the distribution of accumulated veterans' benefits, it does allow dependent parents to receive funds in appropriate situations.

In his argument, plaintiff relies heavily on the reasoning in Berkey v. United States, 361 F.2d 983 (Ct. Cl. 1966). While that case did deal with section 3203(b)(2), and the Court did allow the plaintiff to recover, the facts and reasoning were of such a nature that they cannot be considered persuasive in this case. In Berkey, the plaintiff was the only child of a retired army veteran. The father had entered a Veterans' Administration hospital in 1947 as an adjudicated incompetent and had died there in 1962. Plaintiff thereupon made claim for the army retirement pay that his father had accumulated while in the hospital, but which had been withheld pursuant to section 3203. The Court of Claims allowed plaintiff to recover. Distinguishing between gratuitous benefits and earned benefits, such as the retirement pay involved in that case, the court

reasoned:

> Since Congress was so wholly concerned with gratuitous benefits and with cutting off collateral relatives from such grants, we do not believe that it also intended to bar the immediate family from accumulated pay.

361 F.2d at 990-91. The court in Berkey, however, was careful to point out that it was not expressing any opinion as to payment of gratuitous benefits of incompetent veterans barred by the statute. Id. at 989, n.15. Before giving an extensive discussion of the legislative history of the statute, the court made it clear that it was concerned "only with accumulated retirement pay, not with other types of veterans' benefits, and we look to the history of these provisions with that type of payment specifically in mind." Id. at 986. Thus, the court in Berkey dealt with a limited aspect of veterans' benefits under section 3203(b)(2) and thereby did not reach the question of that section's constitutionality.

The Supreme Court, reiterating its statement in Royster Guano Co. v. Virginia, 253 U.S. 412 (1920), has recently stated:

> "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)."

Johnson v. Robison, supra, 415 U.S. at

374-75 (quoting from Reed v. Reed, 404 U.S. 71, 75-76 (1971).

The classifications of section 3203 (b) sufficiently meet the above test. In that section Congress manifested its intent to regulate the accumulation and distribution of benefits relating to incompetent veterans. At the same time, however, it authorized the Administrator to order payment of all or part of the withheld benefits "to the chief officer of the institution" for treatment or care of the veteran (38 U.S.C. section 3203(b)(4)) and to dependent parents on the basis of need (Id. section 3203(b)(3)).

Defendant has presented data in support of an argument that incompetent veterans suffer longer periods of institutionalization than do competent veterans, thereby causing the accumulation of more funds in their behalf than for competents who are institutionalized. This, defendant contends, serves to justify the differentiation in treatment under section 3203(b) of parents of incompetent veterans and those of competent veterans. Congress' barring of payment of such accumulated sums to someone other than the institutionalized incompetent upon his death, defendant argues, is justified by the fact that it enables the Government to recover excessive amounts of funds which have never benefitted the incompetent, yet would otherwise be paid to his heirs.

A search of the legislative history of the statute in question reveals no discussion of longer periods of institutionalization suffered by incompetent veterans as defendant here suggests. In its explanation of the bill which became the law amending section 3203 in 1959,

Senate Report No. 344 makes brief mention of the substantial savings that would result from the enactment of the bill. While this does not specifically acknowledge a disparity in periods of institutionalization of competents and incompetents, the Court feels a sufficient inference exists that Congress was aware of the disparity and that the denial of payments of accumulated funds to parents of deceased incompetents was motivated by a concern for fiscal integrity.

It has been recognized that "Congress has great latitude in making statutory classifications in social and economic legislation," and that "[a] statutory discrimination will not be set aside as violative of equal protection or due process if any state of facts reasonably may be conceived to justify it." United States v. Weatherford, 471 F.2d 47, 51 (7th Cir. 1972), cert. denied, 411 U.S. 972 (1973). The cases that have dealt with the relation between attempts at conservation of governmental finances and the creation of statutory classifications appear to be in agreement that, although the Government may attempt to conserve its fisc, it may not do so by drawing invidious classifications: Memorial Hospital v. Maricopa County, 415 U.S. 250, 263 (1974); Shapiro v. Thompson, 394 U.S. 618, 633 (1969); Miller v. Laird, 349 F. Supp. 1034, 1046 (D. D.C. 1972).

Here the Court does not feel that the disparity in treatment between the parents of deceased competent veterans and parents of deceased incompetent veterans, apparently motivated by Congress' desire to conserve the Government's finances, is of the nature that would require the

setting aside of the statutory classifications in section 3203(b). Based on the case law and the legislative history that exists, it cannot be said that the classifications found within section 3203(b) can be considered "utterly lacking in rational justification." Flemming v. Nestor, supra. They bear a rational relationship to the objectives of Title 38 and section 3203, that of providing benefits to the needy veteran and his immediate dependents. The Court finds that the statutory classifications are not invidiously discriminatory and that the barring of payments to parents of deceased incompetent veterans under 38 U.S.C. section 3202(b) is not violative of the Due Process Clause of the Fifth Amendment.

In view of the above determination, the Court cannot agree with plaintiff's allegation that the Veterans' Administration interpretation of section 3203(b) is erroneous in that it causes an unconstitutional effect. The decision of the Board of Veterans Appeals reveals an understanding of the statute and its proper application to plaintiff's case.

In light of the facts and law presented, it would appear that defendant would be entitled to a grant of summary judgment. This case, however, is before this Court on plaintiff's motion for summary judgment. While no cross-motion has been filed by defendant, the great weight of authority supports the power of this Court to grant summary judgment to a non-moving party if it is clear that the case warrants that result. See 6 J. Moore, Federal Practice Par. 56.12 (2d ed. 1971). Since in this case there are no material issues to be tried and plaintiff has had a fair opportunity to present all

relevant legal propositions, nothing would now be gained by requiring defendant to file a formal motion.

Accordingly, the Court ORDERS that summary judgment be granted to defendant.

/s Edward M. McEntee
Circuit Judge

/s Frank H. Freedman
District Judge

/s Walter Jay Skinner
District Judge

FOOTNOTES:

[1]A search of the legislative history of section 3021 reveals no indication of the reason for the reference to section 3203(a)(2)(A). Section 3021 was amended in 1972 by Pub. L. No. 92-328, which deleted the portion excepting situations of distribution of benefits arising under section 3203(a)(2)(A). That amendment became effective August 1, 1972, several months after the death of Herbert Ziviak, and is not controlling in this case.

[2]What appears to be an obvious conflict between the language restricting the application of the statute to veterans without wife, child, or dependent parents

and the words directing the payment of the accumulated lump sum to a spouse, child, or dependent parent in the event of the veteran's death, is resolved by section 3203(c) which states that the veterans in question "shall be deemed to be single and without dependents in the absence of satisfactory evidence to the contrary, and by section 3203(a)(2)(B), which allows such survivors to file a claim for the lump sum up to five years after the veteran's death. For further discussion of this aspect of the statute see Berkey v. United States, 361 F.2d 983, 985 (Ct. Cl. 1966).

[3]This provision still exists in the statute as it is presently worded, now being found in subsection (b)(2).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MAX ZIVIAK, Administrator

v. CIVIL ACTION
NO. 74-1062-F
UNITED STATES OF AMERICA

Before McEntee, Circuit Judge,
Skinner and Freedman, District Judges.

JUDGMENT

March 15, 1976

FREEDMAN, D.J.

This matter came on for hearing on plaintiff's motion for summary judgment and defendant's motion to dismiss. The issues having been duly argued by counsel and a decision having been rendered in an opinion filed on March 5, 1976, it is hereby ORDERED, ADJUDGED and DECREED that that motion to dismiss be denied and defendant be granted summary judgment.

/s Edward M. McEntee
Circuit Judge

/s Frank H. Freedman
District Judge

District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

MAX ZIVIAK, ADMINISTRATOR)
)PLAINTIFF'S
VS.)MOTION FOR
)REHEARING
UNITED STATES OF AMERICA)

The plaintiff respectfully moves for a rehearing in this matter as the Court evidently has decided the case on the basis of evidence introduced at the argument of the plaintiff's motion for summary judgment to the effect that incompetent veterans suffer longer periods of institutionalization than do competent veterans. It is respectfully submitted that the opinion of this Court should not be based on such an evidentiary matter without a hearing on the evidence. It should not be decided on the affidavit submitted at the time of the hearing. It is respectfully submitted that the conclusion suggested by this date is surely disputable and that therefore a motion for summary judgment for the defendant should not be entered at this time.

In addition, of course, the plaintiff reiterates his contention that if the period of institutionalization is the supposed ground for the legislation, the legislation would have to at least mention this. Discriminating between parents of competent veterans and incompetent veterans is an arbitrary

DOCKETED

3-15-76
After consideration of said motion for rehearing with Judges McEntee and Skinner, the motion for rehearing is denied.

/s Freedman, J.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

MAX ZIVIAK, ADMINISTRATOR)
)
VS.)C. A. NO.
) 74-1062-F
UNITED STATES OF AMERICA)
)

PLAINTIFF'S NOTICE OF APPEAL

Notice is hereby given that the Plaintiff, Max Ziviak, hereby appeals to the United States Supreme Court from the judgment entered in this Court that the Motion to Dismiss be Denied and the Defendant be granted summary judgment, entered on March 15, 1976.

This appeal is made under 28 U.S.C. Section 1253.

Louis Kerlinsky

Attorney for the Plaintiff
Louis Kerlinsky, Esq.
31 Elm Street
Springfield, Mass.
732-3173
March 19, 1976

I, Louis Kerlinsky, Attorney for the Plaintiff, Max Ziviak, in the above entitled action, hereby certify that on March 19, 1976, I served a copy of the above notice upon the U.S. Attorney's Office, counsel for the Defendant, Boston, Massachusetts, postage prepaid, and upon the Solicitor General, Department of Justice, Washington, D.C. 20530, postage

prepaid.

Louis Kerlinsky

Louis Kerlinsky

Filed: March 26, 1976

No. 75-1490

In the Supreme Court of the United States

OCTOBER TERM, 1976

MAX ZIVIAK, ETC., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1490

MAX ZIVIAK, ETC., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellee moves to affirm the judgment of the district court.

STATEMENT

1. This case involves the constitutionality of a classification in a superseded statutory scheme for the distribution of the "compensation" (*i.e.*, service-connected disability benefits; see 38 U.S.C. 310) of a veteran who was furnished hospital treatment or institutional or domiciliary care by the Veterans' Administration prior to August 1, 1972. That distribution turned upon two principal factors: whether the veteran was competent, and whether he had a wife, children, or dependent parents.[1]

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[1] A parent's dependency is determined in accordance with regulations prescribed by the Administrator, but dependency "shall not be denied * * * in any case * * * where the monthly income for a mother or father, not living together, is not more than $105 * * *." 38 U.S.C. 102(a)(2).

If the veteran was competent and established that he had a wife, children, or dependent parents, compensation was paid to him pursuant to 38 U.S.C. 310 without reduction during the period of institutional care. In that event, no accumulated, unpaid compensation was available for distribution at the time of the veteran's release or death.

If the veteran was competent but did not establish that he had a wife, children, or dependent parents, his monthly compensation payments were reduced, after six months of institutional care, to the greater of one-half his full compensation entitlement or $30. 38 U.S.C. (1970 ed.) 3203(a)(1) and (c). The unpaid compensation that accumulated during the remaining period of institutional care was paid to the veteran in a lump sum after his release. 38 U.S.C. (1970 ed.) 3203(a)(1). If the veteran died prior to release, and if he in fact left a surviving wife, children, or dependent parents, the accumulated, unpaid compensation was distributed to the surviviors in accordance with 38 U.S.C. (1970 ed.) 3203(a)(2)(A).

If the veteran was incompetent and had a wife, children, or dependent parent, his compensation was paid to a guardian, curator, or conservator empowered to make payments on behalf of the veteran and his dependents. See 38 U.S.C. 3202. As was the case with a similarly situated competent veteran, no unpaid compensation would have accumulated for distribution at a later time.

If the veteran was incompetent but did not have a wife, children, or dependent parent, his monthly compensation payments were reduced, after six months of institutional care, to the greater of one-half his full compensation entitlement or $30. 38 U.S.C. (1970 ed.) 3203(b)(1).[2] More-

[2] These payments were made to a guardian, curator, or conservator who could in turn make payments on behalf of the veteran and to his dependent parents. See 38 U.S.C. 3202.

over, if he had no wife or children and "his estate from any source equal[ed] or exceed[ed] $1,500, further payments of * * * compensation * * * [were] not * * * made until the estate [was] reduced to $500." 38 U.S.C. (1970 ed.) 3203(b)(2). In such event, however, the Administrator was empowered to "apportion and pay to the dependent parents of the veteran on the basis of need all or any part of the benefit which would otherwise be payable to or for such incompetent veteran." 38 U.S.C. (1970 ed.) 3203(b)(3). The unpaid compensation that accumulated during the period of institutional care was paid to the veteran "after the expiration of six months following a finding of competency [but] in the event of the veteran's death before payment of such lump sum no part thereof shall be payable." 38 U.S.C. (1970 ed.) 3203(b)(1). See also 38 U.S.C. (1970 ed.) 3203(b)(2).

2. Appellant is the father of an incompetent veteran who died prior to August 1, 1972, while being furnished institutional care by the Veterans' Administration. Since appellant's son was unmarried, had no children, and possessed an estate in excess of $1,500, payment of compensation on his behalf had been suspended during the period of institutional care pursuant to 38 U.S.C. (1970 ed.) 3203(b)(2). During this period, however, the Administrator, acting under the authority granted by 38 U.S.C. (1970 ed.) 3203(b)(3), paid appellant, as a dependent parent, $16,556.72 out of the compensation that had been withheld (Complaint App. 2).

At the time of the son's death, a total of approximately $55,000 in unpaid compensation had accumulated (*ibid.*). Appellant filed a claim with the Veterans' Administration seeking payment of this amount to himself. The Administration's Board of Appeals determined that, under 38 U.S.C. (1970 ed.) 3203(b)(1) and (2), the unpaid compensation was not payable to appellant (Complaint App. 4).

Appellant thereupon instituted this suit for injunctive and declaratory relief in the United States District Court for the District of Massachusetts on behalf of himself and all other similarly situated dependent parents of deceased, incompetent veterans. He contended that 38 U.S.C. (1970 ed.) 3203 impermissibly distinguished between competent and incompetent deceased veterans in providing for the distribution of accumulated, unpaid compensation to their dependent parents. A three-judge district court, convened pursuant to 28 U.S.C. 2282 and 2284, sustained the constitutionality of the statute and denied the requested relief.

ARGUMENT

Appellant's contention is that 38 U.S.C. (1970 ed.) 3203 (b) "unconstitutionally deprive[d] parents of deceased incompetent veterans of benefits paid to parents of deceased competent veterans * * *" (J.S. 5). Two preliminary observations should be made concerning that contention.

First, even under the superseded statutory scheme involved here, benefits were not normally paid to the parents of even unmarried and childless deceased, competent veterans.[3] If the veteran had established that he had a dependent parent, payment of compensation would have continued without reduction during the period of institutional care; no unpaid compensation would have accumulated for distribution after the veteran's death. As a general rule, therefore, nothing would be payable by the Administrator to the parents of a competent veteran at the veteran's death. Parents of such

[3]If the deceased, competent veteran died leaving a wife or child, any accumulated, unpaid compensation was payable to the surviving wife or child and not to the dependent parents. 38 U.S.C. (1970 ed.) 3203(a)(2)(A).

a veteran would be entitled to a distribution of accumulated, unpaid compensation only in the peculiar circumstances where the veteran, by failing to establish that his parents were dependent, suffered a withholding of compensation, but the parents, after the veteran's death, were able to show that they were in fact dependent. See 38 U.S.C. (1970 ed.) 3203(a)(1) and (a)(2)(A).

Second, even that narrow exception to the general rule has now been eliminated. Under current law, the compensation of a competent veteran is not reduced or withheld during a period of institutional care. See Section 104(a) of Pub. L. 92-328, 86 Stat. 394.[4] Accordingly, there are now no circumstances in which accumulated, unpaid compensation is paid to the dependent parents of a deceased, competent veteran.[5] The disparity of which appellant complains no longer exists.

In any event, as we now show, the prior statutory scheme was reasonable in its treatment of the parents of veterans, and its constitutionality was correctly sustained by the district court.

1. Prior to the amendment of the statute in 1972, Congress had chosen to pay compensation, if any, to an individual dependent parent of a veteran in no more than one of two mutually exclusive ways—(1) during the veteran's lifetime, either directly or through payments

[4]Moreover, the compensation of an incompetent veteran receiving institutional care is no longer reduced or withheld merely because he has no wife, child, or dependent parent. See Section 104(c) of Pub. L. 92-328, 86 Stat. 394. The compensation of such a veteran, who has no wife or child, is still withheld, however, as long as his estate exceeds $1,500 and until it is reduced to $500. 38 U.S.C. (Supp. IV) 3203(b)(1).

[5]Amounts previously withheld from the veteran under prior law were distributed to the veteran or his representative in a lump sum after the effective date of the new provisions. See Section 106 of Pub. L. 92-328, 86 Stat. 395.

made to the veteran or his representative, or (2) in a lump sum after the veteran's death.[6] The former method was prescribed for all veterans, whether competent or incompetent, not receiving institutional care: all compensation was paid directly to the veteran or, if the veteran was incompetent, to his representative; a competent veteran was free to provide support for his parents out of the payments he received; similarly, an incompetent veteran's representative was empowered to provide support for his parents. See 38 U.S.C. 3202(d).

The situation was somewhat different for veterans receiving institutional care. A competent veteran receiving such care was in effect given a choice whether to receive sufficient compensation to provide current support for his parents or to receive reduced compensation with the anticipation that the amounts withheld would be paid to him upon release, or to his surviving dependent parents, if any, at his death.[7] Thus the competent veteran's choice controlled the manner of payment to his dependent parents. Incompetent veterans receiving institutional care were, by definition, incompetent to make that choice. Accordingly, the dependent parents of such veterans were provided support directly by the Administrator. See 38 U.S.C. (1970 ed.) 3203(b)(3).

This scheme did not operate unfairly with regard to appellant or the class he represents. Appellant received

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[6]We are concerned here solely with the distribution of the veteran's compensation payable under 38 U.S.C. 310. Under 38 U.S.C. 415, parents of veterans who died as a result of a service-connected disability are entitled to dependency and indemnity benefits; but these benefits, which are payable without regard to the veteran's competency, are not at issue in this case.

[7]The choice existed by virtue of 38 U.S.C. (1970 ed.) 3203(c), which deemed the veteran unmarried and childless in the absence of affirmative proof to the contrary.

direct support during the period of his son's institutional care. He was therefore placed in the same position as the dependent parents of a competent veteran who had chosen to receive his full compensation in order to support them during a period of institutional care. And like such parents, appellant thereby was not entitled to receive additional compensation from the Administrator after the veteran's death. Insofar as appellant's claim is that he should be treated in the same manner as otherwise similarly situated parents of competent parents, therefore, the answer is that he has been.

The only dependent parents who received accumulated, unpaid compensation at their son's death were those as to whom there was a reasonable basis for believing that, unlike appellant, they had been deprived of support during the period of their son's institutional care, as a result of the withholding of compensation. Although some such parents may in fact have received support out of their son's reduced compensation, and therefore may have received an unintended double benefit (current support and lump sum payment), such isolated instances would not render the statutory classification unconstitutional. A presumption that such parents had been deprived of support, "though [it] may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, [was] permissible under the Fifth Amendment * * *." *Mathews* v. *Lucas*, No. 75-88, decided June 29, 1976, slip op. 13-14.

2. Underlying appellant's contention here may be an unarticulated claim that equal protection is denied by paying incompetent veterans who receive institutional care less compensation than is paid to similarly situated competent veterans. An unmarried, childless incompetent veteran receives no compensation during the period of institutional care, so long as his estate exceeds $1,500. See 38 US.C. (Supp. IV) 3203(b)

(1); 38 U.S.C. (1970 ed.) 3203(b)(2).[9] The compensation of a competent veteran is continued without regard to the size of his estate. Thus appellant, as an heir of an incompetent veteran, may take less than would the heir of a competent veteran.

But this difference in treatment has a rational basis. In enacting the Veterans' Act, Congress was concerned not with equalizing the treatment of veterans' heirs but with rewarding veterans for their service by providing for their material well-being. That purpose would not be served by allowing compensation to swell the estates of incompetent veterans who are unable to control their disposition or enjoy their use. The needs of such veterans are met by the Veterans' Administration during the period of institutional care; no legitimate purpose would be served by paying additional, unneeded compensation to the veterans' representatives.

Congress chose to limit payments on behalf of such veterans in order to conserve public funds. Congressman Teague, Chairman of the Committee on Veterans' Affairs, in discussing this provision on the floor of the House of Representatives, explained (105 Cong. Rec. 7320-7321 (1959):

> * * * [T]his bill is designed to prevent the payment of gratuitous benefits for incompetent veterans, who are receiving care at public expense, from accumulating in excessive amounts and passing, upon the death of the incompetent veteran, to relatives having no claim against the Government on account of the veteran's military service.

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[9]Any compensation so withheld is restored to the veteran for his personal use if he regains competency. 38 U.S.C. (Supp. IV) 3203 (b)(1); see also 38 U.S.C. (1970 ed.) 3203(b)(2).

* * * * *

> About $65 million is involved * * *, a considerable portion of which it is believed will be saved by the passage of this legislation.[10]

Thus Congress explicitly weighed its obligation to the incompetent veteran against the fiscal interests of the United States and chose to pay the veteran amounts necessary to his well-being and to retain amounts that the veteran neither needed nor had the capacity to control or enjoy. This choice was rational and therefore may not be disturbed by the courts.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.

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[10]Similarly, Congressman Mitchell observed (*id.* at 7321) that "in many instances incompetent veterans were accumulating large sums in their estates."

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

75-1490

MAX ZIVIAK, individually
and as Administrator of the
Estate of Herbert Ziviak, on
behalf of himself and all
others similarly situated,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellees.

On Appeal from a Three Judge Court of the
United States District Court for the
District of Massachusetts

PLAINTIFF'S PETITION FOR REHEARING

Louis Kerlinsky, Esq.
31 Elm Street
Springfield, Mass. 01103
732-3173

Attorney for Appellants

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

Louis Kerlinsky, Esq.

CERTIFICATE OF SERVICE

I, Louis Kerlinsky, Attorney for the Appellants, certify that on October 18, 1976, I served (2) copies of this Plaintiff's Petition For Rehearing upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by mailing same, postage prepaid, air mail.

Louis Kerlinsky, Esq.
31 Elm Street
Springfield, Mass.
732-3173

Plaintiff respectfully prays for a rehearing in this case where the Court has affirmed the decision of a three-Judge panel upholding the constitutionality of Section 3203(b) of Title 38 of U.S. Code. The Veteran's Administration's interpretation of this statute discriminates against institutionalized veterans and their parents. The Court below found that this case is maintainable as a class action on behalf of all similarly situated parents of incompetent veterans. Contrary to the defendant's Motion to Affirm in this case, the Court below held that "Congress chose to differentiate between survivors of mentally competent and mentally incompetent veterans, barring payment of the lump sum that had been accummulated to the survivors of an incompetent veteran who had died still rated incompetent." JS. page 21. The opinion in the Court below is in conflict with the case of Berkey vs. United States, 361 F2d 983 (Ct. Cl. 1966). While the Court in Berkey did not express an opinion as to the payment of so-called gratuitous benefits, the reasoning of the Berkey case clearly applies to them. The Court below held that there was no unconstitutional discrimination because "Congress was aware of the disparity in length of hospitalization between incompetent and competent veterans." See JS page 30. There was no proof that any such disparity existed. The case was decided on a Motion for Summary Judgment. The record does not show that if there was any such disparity that that was the basis of the Congress' discriminatory treatment. Nor does it show that the Veterans Administration's interpretation of this statute is correct. The de-

fendant in its motion to affirm does not rely on any such basis and makes no mention of the rationale of the Court below in its motion to affirm. If the period of hospitalization is the rationale for the discriminatory treatment then the statute is clearly irrational and arbitrary. If Congress intended to limit the benefits of persons if the duration of their hospitalization, exceeding a certain period of time, the statute should so state and any statute which attempts to reach the same result by an inference that incompetent veterans are hospitalized longer than competent veterans is clearly arbitrary and unreasonable. By affirming the decision of the Court below, the U.S.S. Court is affirming the reasoning of the Court below to the effect that Congress had a rational justification in discriminating against incompetent veterans alone where it intended to discriminate against persons who were hospitalized for certain periods of time. The categorization is too broad, as some of the incompetent veterans in this class action may well have been hospitalized for a relatively short period of time. To affirm the granting of summary judgment in favor of the defendant in this case without a hearing and without the filing of briefs deprives parents of incompetent veterans sums due to the veterans for service-connected disabilities simply because of their disability was of a mental nature rather than of a physical nature. The only purpose of the Act that appears from the Congressional Record is that Congress wished to save money. There is no reason set forth in the legislative history for discriminating against parents of incompetent veterans. Such discrimination is irrational, arbitrary and invalid.

It is respectfully submitted that the Plaintiff is entitled as a matter of law to an appeal to the United States Supreme Court. This appeal involves and entails the right to file a brief on the issues involved in the case so that the Court may consider the Plaintiff's position on a brief if not an oral hearing. It is respectfully submitted that the Plaintiff has been deprived of his right to set forth his position on appeal to the United States Supreme Court. Plaintiff did not understand or contemplate that his entire brief or the substance of his brief should be included in his Jurisdictional Statement or in any brief in opposition to the Defendant's Motion to Affirm. It was the understanding of the Plaintiff's Attorney that the purpose of the Jurisdictional Statement was to show that the Court had jurisdiction over the case. As the case involved substantial sums of money and involved a constitutional issue, it would appear that the reasons for the Plaintiff wanting to file a brief were apparent and adequately appeared from the Jurisdictional Statement. Plaintiff feels that he has an inherent right to file a brief to the United States Supreme Court on the issues involved in this appeal and that the disposition of his case by the United States Supreme Court without giving the plaintiff an opportunity to file a brief deprives the plaintiff of his right to be heard and to his right to a meaningful appeal.

Respectfully submitted.

Louis Kerlinsky

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Springfield, Mass.
732-3173

No. 75-1490

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1976

MAX ZIVIAK, ETC., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO AFFIRM

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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1976

NO. 75-1490

MAX ZIVIAK, ETC., APPELLANT

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COURT FOR THE DISTRICT OF MASSACHUSETTS

PLAINTIFF'S BRIEF IN OPPOSITION TO
DEFENDANT'S MOTION TO AFFIRM

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1. It is clear that the statutory scheme in question as applied by the Veteran's Administration discriminates against parents of deceased veterans solely because of the incompetency of the veteran. See the Findings and Decision of the Board of Veteran Appeals herein dated January 30, 1974, a copy of which is attached to the Complaint, at p. 3, Opinion of Freedman, D.J. in the U. S. District Court in the case at bar (J.S.21) 411 F.S. 416, Berkey v. U.S., 361 F. 2d 983 (U.S. Ct. of cls. 1966) at p. 986. Had plaintiff's son died competent, payment of the withheld compensation would have been made.

2. The payments of the veterans withheld compensation provided by the statute to parents of competent veterans are not based on nor related to the parents' need for a particular amount of support and the purpose of the statute is not related to any such degree of need. The discretionary payments to parents of incompetents based on their need under 38 U.S.C. Section 3203(b)(3) which may be made during the lifetime of an incompetent veteran need not be in the same amount as the compensation paid to parents of competent veterans and were less than such an amount in this case. Section 3203(b)(3) does not assure equal treatment of parents of incompetent and competent veterans. It may merely reduce the amount of discrimination in some cases.

3. The purpose of the statute was not just to prevent the accumulation of compensation of institutionalized veterans. There is no such prohibition regarding competent veterans. The purpose is to prevent the accumulations from passing on the death of the veteran to remote relatives. See 105 Cong. Rec. 7320-7321 (1959). Parents were not deemed such remote relatives prior to the 1959 amendment to Section 3203(b). Parents of competent veterans are not deemed such remote relatives and to so classify parents of incompetent relatives is irrational.

The purpose of the provisions for payment to parents after the death of the veteran was not to provide for the needs of the veteran nor to enable him to enjoy or control the compensation he would have received during his lifetime. The vet-

eran's withheld compensation is paid to his parents after his death for his parents' benefit. There is no reason to differentiate between parents of competent veterans and parents of incompetent veterans. Nor is there any basis for finding that institutionalized incompetents as a class have lesser needs or enjoyments than institutionalized competents nor that their lack of control cannot be remedied by guardians even if such considerations were relevant. Constitutional rights should not be forfeited just to conserve public funds.

The Defendant's Motion to Affirm should be denied.

Respectfully submitted.

Louis Kerlinsky

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